

August 1, 2005

Western Washington Municipal SW Comment
Charlene Witczak
WA Department of Ecology
Water Quality Program
PO Box 47600
Olympia, WA 98504-7600

RE: Preliminary Draft of NPDES Phase II Permit

Dear Ms. Witczak,

Following are Kitsap County's comments on the May 16, 2005 Preliminary Draft of NPDES Phase II Permit.

General Comments:

- **Prior Accomplishments:** If a permittee has already completed an action prior to the issuance date, does that action have to be repeated within the permit term? Examples include: Already surveyed three priority outfall areas (2002-2004) and are now surveying lower priority areas for illicit discharges. We would like to continue our current program and not "reset" it based on the permit issue date. Public involvement on the stormwater plan was done in 1993 and 1994 during the creation of the County's comprehensive stormwater management plan and associated stormwater management utility. This seems wasteful to artificially repeat this process to comply with permit issue date.
- **Monitoring:** The draft permit requires the 85 Western Washington Phase II jurisdictions to develop comprehensive stormwater monitoring plans, and do so in a way that proves the Department of Ecology (Ecology) manual, BMPs, and approaches to stormwater discharges result in improvements to water quality and overall environment. The cost implications of this requirement are enormous, and the expectation of what is to be achieved is simply beyond what we consider reasonable. There are simply too many variables and factors that affect environmental conditions – most of them out of our control -- for us to specifically measure how stormwater programs and BMPs are improving water quality. We would like to see an alternative monitoring plan that is more achievable, with adaptive management features that can be more easily measured.

Regional water quality monitoring and development of detailed watershed models area already underway for the receiving waters and watersheds of Kitsap County (Hood Canal, Dyes Inlet, Sinclair Inlet) by the Ecology, US Navy, USGS, and US EPA as part of project ENVVEST and the Hood Canal Low Dissolved Oxygen studies. Kitsap County does not wish to duplicate these efforts.

- **Pre-development, forested conditions – and legal ‘takings’ concerns:** Language in the permit as drafted requires that stormwater flows be mitigated to meet a standard of pre-development, forested conditions. We believe that in urban and urbanizing environments, this standard is unattainable and raises serious legal concerns. We strongly believe that mitigation requirements outlined in the draft permit would leave our jurisdictions very vulnerable to “takings” claims. Specifically, we cite the *Nollan vs. California Coastal Commission* and *Dolan v. City of Tigard* cases, as well as a March 1995 memorandum from the State Attorney General’s Office that reads in part, “...a permit condition which imposes substantial costs or limitations on property uses could be a taking. In assessing whether a regulation or permit condition constitutes a taking in a particular circumstance, the courts will consider the public purpose of the regulatory action along with the extent of reduction in use of and economic impact on the property. The burden on the property owner must be roughly proportional to the adverse public impact sought to be mitigated.”
- **“New discharge” definition:** Language in the permit would seem to imply that *any* change to an existing outfall – even replacing a culvert to comply with Washington Department of Fish and Wildlife guidelines – is to be defined as a “new discharge.” This would appear to fly in the face of vesting laws, and would put major burdens on our jurisdiction. We would like the definitions to clarify that replacement of failing or inadequate outfalls does not qualify as a ‘new’ stormwater discharge.
- **Deadlines that are unattainable:** We also note that the Phase II permit as drafted contains a wide array of adoption deadlines and inspection frequencies, many of them within one year. These will be difficult to impossible to attain, particularly for the smaller Phase II jurisdictions that do not yet have a formal stormwater program or a dedicated revenue source. It is surprising to note that the Eastern Washington preliminary draft Phase II permit compliance schedule allows much more time in several areas. In particular:
 - Double the time to have a construction and post construction regulation in place.
 - One more year to have all outfalls mapped
 - Less frequent inspection of BMP’s
 - Three more years to develop an illicit discharge program
 - Three more years to develop a site plan review program
 - Three more years to conduct initial employee training
- **Testing and reporting requirements:** If Ecology wants all existing BMPs subjected to testing, we believe the cost and responsibility for that testing should

be on Ecology, not local jurisdictions. We also have concerns that the reporting requirements in the draft permit will be too burdensome – particularly for smaller jurisdictions – and that annual reporting of things such as expenditures is a subjective measurement that does not improve the environment or stormwater programs in general.

- **Assumptions regarding adoption of the Ecology stormwater manual:** The Phase II draft makes the tacit assumption that jurisdictions should adopt the Ecology stormwater manual as Best Available Science (BAS). The manual – which was intended to be used for guidance only, not as a requirement – contains a number of conditions that are of serious concern to our jurisdiction. For example, it classifies replacement (maintenance action, not expansion) of already-imperious surfaces, including roads, as redevelopment. It also contains standards on enhancing water quality that we do not believe are scientifically defensible. In addition, the option to adopt an equivalent manual that recognizes municipality-specific conditions is not provided in Phase II as it is in Phase I.
- **Fiscal, liability, and staffing concerns:** We are concerned that many Phase II jurisdictions are paying new permit fees under Phase II, and yet Ecology still does not have staffing in place to properly review the Phase II programs that will be submitted. This leaves cities and counties wondering what we are paying for, and whether there will be the “coverage” that we saw as a central reason to go forward with a Phase II permit requirement in the first place. If we have standards that are too high, and a lack of certainty on administrative review and protection, this only serves to *increase* our liability exposure rather than *reduce* it, as was intended.

Specific Permit Comments:

Page 3 Line 7: Portions of Kitsap County’s MS4 are linked to federal military installations and tribal systems, and in some cases, the outfalls are situated within these federal lands. While we recognize that military bases and tribal reservations are exempt from these permit requirements, we are concerned that several permit provisions, particularly monitoring requirements, will be difficult to comply with for those portions of the MS4 outside of our direct control.

Page 3 lines 35-39: The applications mentioned in this section contained proposed BMPs, measurable goals, and milestones for each of the six minimum measures. Recommend stating that the BMPs, measurable goals, and milestones contained within the 2003 applications are not considered as part of the stormwater management plan required under special condition S7 unless specifically adopted by the permittee in the stormwater management plan.

Page 6 line 32: States that compliance with the permit constitutes compliance with the TMDL and also states that documentation of all relevant actions that affect MS4

discharges to the water body must be included in the annual report. The type of extent of documentation required is not identified.

Page 8 line 5, Page 37 line 42, Page 38 lines 1-12: The definition of a new stormwater outfall is confusing. Page 38 lines 5, 6 & 7 state "A new stormwater outfall does not include a replacement of an existing outfall, provided that the replacement does not increase the volume, flow rate, or pollutant load of the discharge..."

This definition could be construed to mean that if one changes the pipe material or size and hence increases the flow capacity, then the outfall is new. This interpretation limits a jurisdiction's ability to provide relief from localized flooding caused by conveyance capacity constrictions. Changes in pipe material are common during maintenance actions and should not be considered new construction. A proposed change is "A new stormwater outfall does not include a replacement of an existing outfall, provided that the replacement does not increase volume or pollutant load of the discharge..."

Page 9 lines 26+ Monitoring: This requirement is not consistent with the December 8, 1999 Federal Register publishing of the Phase II rules page 68769:

"EPA recommends that in general, NPDES permits for small MS4s should not require the conduct of any additional monitoring beyond monitoring that the small MS4 may be already performing. In the second and subsequent permit terms, EPA expects that some limited ambient monitoring might be appropriately required for perhaps half of the regulated small MS4s. EPA expects that such monitoring will only be done in identified locations for relatively few pollutants of concern. EPA does not anticipate "end-of-pipe" monitoring requirements for regulated small MS4s."

S6 of the preliminary draft permit implies that all Western Washington small MS4s will have to conduct monitoring. Without any guidance provided within the Phase II draft permit, one must look at the Phase I permit for a likely required plan. The Phase I monitoring plan is cost prohibitive (our initial cost estimates are ~ \$180,000 in start up costs and additional annual analysis cost of ~\$280,000 per year not including staff time) for small MS4s to conduct and requires end-of-pipe sampling and sampling for multiple parameters including biological parameters. These requirements are clearly beyond the federal guidelines and are an unfunded state mandate.

Page 9 line 26+ Monitoring: Due to the complexity of tides and other inputs into marine waters, determining the causation of receiving water quality is beyond the means of a Phase II community. Receiving water sampling in Kitsap County is influenced by major tidal action. There are many other inputs, in addition to a community's stormwater, into receiving waters such as local streams, marinas and boat traffic, wastewater treatment plants, failing septic systems, industrial sources, AND stormwater from other MS4s, etc. Without an organized, highly technical monitoring program and model, the determination of stormwater impact would not be able to be discerned. This coordination, review, and interpretation is best managed by state agencies, and is inappropriate to delegate to the Phase II communities.

Page 11 lines 15 to 17 Monitoring: “The Department will review the Permittee’s program and will either approve the program as is or with modifications at the Department’s discretion.” Since the permit will be over four years old by the time this action is taken, the permittee will not have the ability to appeal this critical decision by Ecology regarding the permit. Such a case provides Ecology the ability to alter the permit without public process. To avoid this situation, we suggest that Ecology establish a compliance-monitoring program and publish it for comment within the permit and establish an ambient water quality monitoring and BMP effectiveness-monitoring program and conduct them with the fees generated by the permit.

RCW 90.48.100 provides the right for Ecology to “request and receive the assistance of any educational institution or state agency when it is deemed necessary by the department to carry out the provisions of this chapter.” We believe ambient water quality monitoring and BMP effectiveness monitoring are two candidates for assistance to Ecology by the University of Washington or another state university.

Page 11, line 22, S7. Stormwater Management Program: Of the questions asked in the box, Kitsap County does not think the Phase I and II permits have to have a consistent organization structure/outline for the stormwater management programs. The December 8, 1999 EPA rule in the Federal Register makes a clear distinction between phase I and phase II communities.

Page 13 line 25 to 27: Designing an outreach program to reach 100% of the public, businesses, engineers, contractors, developers, development review staff, land use planners, and others is an unrealistic requirement. Recommend use of maximum extent practicable language.

Page 14 line 5: Requires permittees to post SWMP information, required documentation and all required submittals on their website. It is likely that at least some regulated jurisdictions do not have this capacity and will not have it developed within the next year. Recommend that Ecology give the option to post the information on the Ecology website in lieu of posting on local government website for those entities without websites as stated in the Eastern Washington preliminary draft Phase II permit.

Page 14 Line 17: Requiring “periodic” updates of maps is not sufficiently clear. Either identify an expected frequency of updates or simply say that jurisdictions shall update maps on an as needed basis.

Page 14 lines 31 to 34: The GIS requirements listed in the section seem onerous. The Eastern Washington preliminary draft Phase II permit does not require GIS mapping. If the intent of the mapping is to have the capability to trace illicit discharges back to their source, what does it matter the format of the map as long as it is accurate and kept up to date?

Page 16 Line 25 through 27: Requires permittees to “ensure termination of the connection within 180 days”. Legal circumstances may prevent a municipality from being able to ensure termination within a set timeline.

Page 16 Lines 39&40: The term “appropriate training” is not sufficiently clear.

Page 17, Line 21 – One year does not provide enough time to implement an ordinance for controlling runoff (or to implement other elements of the permit) particularly if the jurisdiction is planning to prepare a new stormwater manual. The public meetings and other Growth Management Act related process would likely take more than one year to complete. The compliance deadline should be at least two years after the effective date of the permit as stated in the Eastern Washington preliminary draft Phase II permit. Also, it would be helpful if model ordinances were made available to provide guidance to local jurisdictions.

Page 18 Line 11: How do Low Impact Development Techniques differ from LID?

Page 20 line 12: states “Adequate” training. What constitutes adequate?

Page 21 line 2: The term major storm events does not adequately define permit expectations. Recommend the greater than the 10-year recurrence interval found in the Eastern Washington preliminary draft Phase II permit for the same action.

Page 23 lines 29 & 31 & Page 24 lines 3 & 6: Change the word control to the word regulate.

Page 28, Line 29: Tracking and reporting program expenditures is an unnecessary administrative task. Expenditures and water quality outcomes are not necessarily linked. While it is relatively easy to report total amount of money collected by a stormwater utility, it is not reasonable to request that County’s who will have SWMP activities occurring in permit and non permit areas, to segregate their tracking and accounting systems in order to report costs of development and implementation to the state. In addition, Ecology also needs to recognize that other local programs outside of a stormwater utility may be providing services that are not easily tracked or reported as a subset of permit / non permit areas, e.g. the solid waste utility in a jurisdiction may provide the education and outreach associated with disposal of toxics materials like oil, batteries and home chemicals, or operate a moderate risk waste facility that serves the greater community. Lastly, dollars expended indicates neither program effectiveness nor efficiency it only represents the amount of money spent. The numbers reported will not capture all that could and should be reported as cost of compliance and will have significant variability resultant of the level of sophistication of accounting systems. This information will require a significant amount of effort to generate and will be of little value.

Appendix I: This appendix requires one to mitigate flow to a forested condition. However, for projects in which the predevelopment land cover is not forest, this

standard requires mitigation beyond the impact of the proposed development. Such a situation is grounds for a takings claim.

State of Washington Attorney General's recommended process and advisory memorandum for evaluation of proposed regulatory or administrative actions to avoid unconstitutional takings of private property March 1995 states:

“However, a permit condition which imposes substantial costs or limitations on property use could be a taking. In assessing whether a regulation or permit condition constitutes a taking in a particular circumstance, the courts will consider the public purpose of the regulatory action along with the extent of reduction in use of and economic impact on the property. The burden on the property owner must be roughly proportional to the adverse public impact sought to be mitigated.”

The 2001 Herrera Cost Analysis Report indicates that the 2005 Ecology manual standard would increase the stormwater mitigation costs of a typical 1-acre commercial development from \$40,000 to \$570,000 (1290% increase). This mitigation impact appears to contradict the above guidance from the Attorney General.

Recommend that the project proponent must mitigate flows (duration and peak as described in the appendix) to the actual predevelopment land use condition. This change is still in keeping with the anti degradation water quality standard since it would not result in a lowering of the current water quality. This definition is also consistent with the December 8, 1999 Federal Register publishing of the Phase II rules page 68761:

“Pre-development refers to runoff conditions that exist onsite immediately before the planned development activities occur. Pre-development is not intended to be interpreted as that period before any human-induced land disturbance activity has occurred.”

Appendix I: This section was obviously cut and pasted from the Western Washington Stormwater Manual. There are still references to sections of the manual such as Page 3 under Maintenance. The last sentence refers to section 2.2. There is no section 2.2 of Appendix I. Recommend a thorough review of this appendix to make it a stand-alone document or state at the beginning that references to chapters and sections are from the Western Washington Stormwater Manual.

Other examples:

Page 2 under Effective Impervious Surface refers to Chapter 5 of Volume V but does not specify that the chapter and volume are from the W. WA Storm Manual

Page 5 under Source Control BMP refers to Volume IV

Page 6 starts the section numbering at 2.4. There are no section numbers prior to this page.

Page 26 under Additional Requirement refers to “this manual”

Appendix I page 1, Exemptions - Road Maintenance:

The definitions of the exemptions covered in this section can be improved for clarity. The reference to square cut patching – should be revised to read *neat line or saw cut patching*. The reference to “without expanding the area coverage” should be revised to say *beyond historic dimensions*.

Appendix 1 page 2 first two bullets: These bullets state that while gravel shoulders and bituminous surfaces are impervious, the changing of these surfaces to another road covering such as asphalt or concrete is the creation of redeveloped impervious surface. These statements are not scientifically defensible and constitute a taking under federal law. This surface is already impervious and the action taken by the developer is to overlay the impervious surface with another form of impervious surface there is no discernable impact. Therefore, to make that developer mitigate beyond the impact of the action being taken is a constitutional taking of private property.

Additionally, this policy is counter to development of non-motorized transportation opportunities. If bicycle lanes and sidewalks created by paving an already impervious surface such as a gravel shoulder require full flow rate and water quality mitigation as if they were new, these alternate modes of transportation will either be built at a greatly reduced rate or not at all.

Recommend the exemptions for road maintenance listed in Appendix II of the Eastern Washington preliminary draft Phase II permit.

Appendix 5:

In the third paragraph under “Street Waste Liquids”, Ecology references “Ecology’s Stormwater Management Manual for Western Washington.” It should be clarified which version, 2001 or 2005, is being referred to.

Our staff contact for these comments is David Tucker, Senior Program Manager Surface and Stormwater Management Program. He can be reached at (360) 337-7292.

Sincerely,

Randy W. Casteel, P.E.
Director of Public Works

cc: David Tucker P.E., Program Manager SSWM
Commissioner Jan Angel
Commissioner Chris Endresen
Commissioner Patty Lent
Cris Gears, County Administrator